



**Squishy Drinks Limited v Kevian Kenya Limited (Civil Application
386 of 2019) [2022] KECA 452 (KLR) (18 March 2022) (Ruling)**

Neutral citation: [2022] KECA 452 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 386 OF 2019
MSA MAKHANDIA, DK MUSINGA & PO KIAGE, JJA
MARCH 18, 2022**

BETWEEN

SQUISHY DRINKS LIMITED APPELLANT

AND

KEVIAN KENYA LIMITED RESPONDENT

*(Being an application for stay of the Orders the High Court of Kenya at
Nairobi (Kasango, J.) dated 4th December, 2019 in HCCC NO. 114 OF 2019)*

RULING

1. By a motion dated 11th December, 2019 and brought under Rule 5(2)(b) of the [Court of Appeal Rules](#), the appellant, Squishy Drinks Limited, seeks the following orders as against Kevian Kenya Limited, the respondent that;
 2. This Honourable court be pleased to stay the orders of the learned Honourable Justice Mary Kasango dated 4th December 2019.
 3. This Honourable court be pleased to grant interim orders to the Appellant/Applicant restraining the Respondent, its servants or agents from continuing to infringe the Appellant's trademark by manufacturing, distributing and sale of products under the trademark "SQUISHY" pending the hearing and determination of this Application and subsequent appeal.
 4. This Honourable court be pleased to grant interim orders to the Appellant/Applicant restraining the Respondent from attempting to fraudulently effect a registration of a transmission of the trademark "SQUISHY" in its name.
 5. This Honourable court be pleased to grant interim orders barring the distribution of Squishy products to the Uganda market through the Kenya



Port pending the hearing and determination of this Application and subsequent appeal.

6. This Honourable court be granted orders barring Kevian from using Robert Kaniu Wainaina's personal details - phone number on packaging and seize all packaging that has his personal number.
 7. The costs of this Application and subsequently appeal be provided for.
 8. This Honourable court be pleased to make any other orders that it deems fit.
2. The motion is founded on 5 grounds appearing on the face of it and is supported by an affidavit sworn by Evelyn Wairimu Njenga, the appellant's Director. It was explained that the appellant commenced proceedings in the High Court with a view of obtaining an injunction to restrain the respondent from infringing on its trademark "SQUISHY" (the trademark).
 3. During the pendency of the matter, the appellant unearthed an attempt by the respondent to fraudulently transmit the trademark in its favour. This prompted it to file under certificate of urgency an application for interim injunctive orders restraining the respondent from infringing on its trademark and attempting to tamper with it. These prayers were granted by the court below and orders were issued to that effect.
 4. In opposition, the respondent filed an application seeking to set aside the interim orders and simultaneously sought for an injunction restraining the appellant from use of the trademark. It is on the basis of this application that on 4th December, 2020, Kasango, J. vacated the interim injunction previously granted in favour of the appellant and granted the respondent the injunction sought.
 5. Dissatisfied with the outcome, the appellant filed a notice of appeal which gives us jurisdiction to hear and determine the 5(2)(b) application before us.
 6. The appellant complained that due to the said injunctive orders, the learned Judge had encouraged economic sabotage against it by having two companies own the rights to the trademark. If the injunction is not granted, the appellant stands to suffer irreparable loss and damage as this is the trademark within which it manufactures and distributes its products.
 7. The respondent opposed the application through a replying affidavit sworn by Richard Kimani Rugendo, its Managing Director. He deposed that; the appellant had not served a notice of appeal upon the respondent; the appellant continued to use the trademark in contempt of the order of the court; and the appellant had simultaneously filed an application dated 9th January, 2020, in the High Court, for review of the order in question herein.
 8. For an appellant to succeed in obtaining the relief under Rule 5(2)(b) of this Court's Rules, it must show that it has an arguable appeal and that if the orders sought, be they of stay of execution or injunction, are not granted, the said appeal would be rendered nugatory. See [*Stanley Kangethe Kinyanjui -vs- Tony Ketter & 5 Others \[2013\] eKLR*](#).
 9. We have considered the application and established that after filing this application, the appellant has also sought for the review of the impugned order at the High Court. Thus, if we entertain this application, the same issue shall be determined simultaneously by this Court and the High Court. This appears to be a case of hedging its bets by the appellant and smacks of forum shopping and an abuse of process. This is especially so when the law does not countenance the simultaneous pursuit of a review of and appeal against the same order.



10. Moreover, the application for review was made in January, and it is most likely that a ruling has already been delivered, which may render our intervention ineffective. Courts should not issue orders in vain. As things stand, there is a high risk of such eventuality creating a legal absurdity and to avoid such an absurdity, this application must be dismissed. See, *Tanzania Roads Agency -vs- Kundan Singh Construction Limited & Another [2013] eKLR*.
11. For these reasons, we find that this application lacks merit and is dismissed in its entirety with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

D. MUSINGA

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

